Supreme Court, U.S.
F I L E D
SEP 3 1992
OFFICE OF THE CLERK

No. 92-237

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CITIZENS ELECTRIC CORPORATION,

Petitioner,

v.

UNITED STATES FIDELITY
AND GUARANTY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT UNITED STATES FIDELITY AND GUARANTY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY L. CRAMER
T. MICHAEL WARD *
BROWN & JAMES, P.C.
705 Olive Street, Suite 1100
St. Louis, Missouri 63101
(314) 421-3400
Counsel for Respondent.

*Counsel of Record

September 3, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3286

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit, on review of the judgment of the United States District Court for the Eastern District of Missouri sitting in diversity, properly interpreted the provisions of respondent's insurance policies under Missouri law.

Page

TABLE OF CONTENTS

QUESTION PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

THE WRIT SHOULD BE DENIED. 4

I. The Interpretation of Respondent's Policies Of Insurance Is A Question Of Missouri Law Not Generally Reviewable Under A Writ Of Certiorari 4

II. The Eighth Circuit's Characterization Of Environmental Response Costs As Equitable Does Not Conflict With A Prior Decision Of This Court 5

III. The Eighth Circuit's Decision Was Proper Under Missouri Law 9

IV. Public Policy Does Not Require The Eighth Circuit's Decision To Be Reversed 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Avondale Industries, Inc. v. Travelers Indemnity Company, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 496 U.S. 906 (1990). 3

Bowen v. Massachusetts, 487 U.S. 879 (1988). 6

Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Company, Inc., 842 F.2d 977 (8th Cir.) (en banc), *cert. denied sub nom. State of Missouri v. Continental Insurance Companies*, 488 U.S. 821 (1988). 2-3, 5-9

Exxon Corporation v. Hunt, 475 U.S. 355 (1986). 3, 5-8, 10

Heartland Stores, Inc. v. Royal Insurance Company, 815 S.W.2d 39 (Mo.App. 1991) 10

Cases, continued: Page

Independent Petrochemical Corporation v. Aetna Casualty & Surety Company, 944 F.2d 940 (D.C. Cir. 1991), *cert. denied sub nom. Certain Underwriters at Lloyd's, London v. Independent Petrochemical Corporation*, ___ U.S. ___, 112 S.Ct. 1777 (1992) 4

Maryland Casualty Company v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988). 3, 7

Moore v. Commercial Union Insurance Company, 754 S.W.2d 16 (Mo.App. 1988) 9

Pennsylvania v. Union Gas Company, 491 U.S. 1 (1989). . . . 5, 8

Pierson v. Ray, 386 U.S. 547 (1967) 4

Ruhlin v. New York Life Insurance Company, 304 U.S. 202 (1938). 3, 4

Schnuck Markets, Inc. v. Transamerica Insurance Company, 652 S.W.2d 206 (Mo.App. 1983) 9-10

United States v. Northeastern Pharmaceutical & Chemical Company, Inc., 810 F.2d 726, (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) 7, 11

United States v. Price, 688 F.2d 204 (3d Cir. 1982) 7

Statutes:

Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended 42 U.S.C. §9601, *et seq.*, and the following sections thereof:

106 (42 U.S.C. §9606). 7
107 (a)(4)(A) (42 U.S.C. §9607(a)(4)(A)) 7
107 (a)(4)(B) (42 U.S.C. §9607 (a)(4)(B)) 8
107 (a)(4)(C) (42 U.S.C. §9607 (a)(4)(C)) 8

Miscellaneous:

Brett, *Insuring Against the Innovative Liabilities and Remedies Created by Superfund*, 6 UCLA J. Envtl. L. & Pol'y 1 (1986). 11

Miscellaneous, continued: Page

Insurer Liability for Cleanup Costs of Hazardous Waste Sites: Hearing Before the Subcommittee on Policy Research and Insurance of the House Committee on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess. (1990) 11

No. 92-237

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CITIZENS ELECTRIC CORPORATION,

Petitioner,

v.

UNITED STATES FIDELITY
AND GUARANTY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT UNITED STATES FIDELITY AND GUARANTY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Petitioner asks this Court to review the decision of the United States Court of Appeals for the Eighth Circuit in favor of respondent, United States Fidelity & Guaranty Company, in this diversity case. The question decided by the Eighth Circuit was one of state law, namely,

whether environmental response costs incurred pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9607(a), are "damages" covered by liability insurance under Missouri law, and involved a judicial construction of the insuring agreement set forth in each of respondent's policies issued to petitioner. Stated generally, this agreement limited respondent's indemnity obligation to "all sums which [petitioner] shall become legally obligated to pay as damages" on account of property damage caused by an "occurrence." The Eighth Circuit, bound by its earlier decision on Missouri law in *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Company, Inc.*, 842 F.2d 977 (8th Cir. 1988) ("*NEPACCO*"), decided this question in the negative.

Before this Court, petitioner seeks review of this state-law question on the ground that the Eighth Circuit's decision conflicts with a prior decision of this Court. In *NEPACCO*, the Eighth Circuit held that recovery of damages for personal injury and property damage due to the improper disposal of hazardous wastes is covered by liability insurance, but environmental response costs are not because such costs are equitable in nature. *NEPACCO*, 842 F.2d at 987. In effect, the Eighth Circuit distinguished between sums paid in compensation to third parties for injury to person or property caused by the insured's conduct – sums traditionally covered by insurance – and the insured's own costs incurred in its efforts to comply with the regulatory directives of the United States Environmental Protection Agency to remediate environmental contamination.

Contrary to petitioner's assertion, the Eighth Circuit's decisions in this case and *NEPACCO* do not conflict with any decsion of this Court. Rather, the Eighth Circuit's

characterization of environmental response costs accords with the decisions of this Court. In *Exxon Corporation v. Hunt*, 475 U.S. 355, 359-360 (1986), the Court recognized that CERCLA response costs are not compensatory in nature, but are imposed to facilitate government cleanup of hazardous waste discharges and the prevention of future releases. And even if, pursuant to petitioner's invitation, this Court were to affix the label of "money damages" to environmental response costs, the labeling would not be dispositive of coverage actions under state law. Notwithstanding the Court's label, a state court would be free to examine the substance of an underlying cost-recovery action to determine whether it involved sums which the insured shall become legally obligated to pay as damages on account of property damages caused by an occurrence.

In effect, petitioner's assertion of a conflict with a prior decision of this Court is a transparent attempt to seek review of a state-law claim. This it may not do.

In *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202, 206 (1938), this Court made it plain that it does not decide state-law contractual questions involved in insurance coverage disputes. Indeed, four times this Court has been asked to address the "damages" issue in the context of environmental response costs. And, four times the Court has denied certiorari. *See, e.g., Maryland Casualty Company v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Company, Inc.*, 842 F.2d 977 (8th Cir.) (en banc), *cert. denied sub nom. State of Missouri v. Continental Insurance Companies*, 488 U.S. 821 (1988); *Avondale Industries, Inc. v. Travelers Indemnity Company*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 496

U.S. 906 (1990); and *Independent Petrochemical Corporation v. Aetna Casualty & Surety Company*, 944 F.2d 940 (D.C. Cir. 1991), *cert. denied sub nom. Certain Underwriters at Lloyd's, London v. Independent Petrochemical Corporation*, ____ U.S. ____ , 112 S.Ct. 1777 (1992). The Court should deny the writ in this case too.

THE WRIT SHOULD BE DENIED

I.

THE INTERPRETATION OF RESPONDENT'S POLICIES OF INSURANCE IS A QUESTION OF MISSOURI LAW NOT GENERALLY REVIEWABLE UNDER A WRIT OF CERTIORARI.

This is a diversity case in which the United States Court of Appeals for the Eighth Circuit interpreted under Missouri law the terms of several insurance policies issued by respondent to petitioner, holding that environmental response costs are not "damages" covered by respondent's policies. This state-law question does not warrant certiorari.

This Court has repeatedly explained that its role is not to review the decisions of federal appellate courts on questions of state law. *Pierson v. Ray*, 386 U.S. 547, 558 n. 12 (1967). This is particularly true in the context of state-law contractual questions. In *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202, 206 (1938), the Court made it plain that it does not decide such matters in insurance coverage disputes, although the federal circuits may be divided on the issue. And, in this case, there is no reason why this longstanding practice should now be abandoned.

II.

THE EIGHTH CIRCUIT'S CHARACTERIZATION OF ENVIRONMENTAL RESPONSE COSTS AS EQUITABLE DOES NOT CONFLICT WITH A PRIOR DECISION OF THIS COURT.

Petitioner nevertheless attempts to evade the Court's longstanding practice not to address state-law questions in diversity cases by asserting that the Eighth Circuit's decision that CERCLA cost-recovery actions are "equitable" in nature conflicts with a prior decision of this Court which held that such actions seek relief in the nature of "money damages." Petitioner's contention does not warrant certiorari. No true conflict exists.

Petitioner cites to the Court's decision in *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989), as a basis for the purported conflict between the rulings of this Court and those of the Eighth Circuit. Review of the *Union Gas* decision, however, discloses no such conflict. The Court's decision did not address the salient issue presented by *NEPACCO* and this case, namely, whether environmental response costs are compensatory damages paid to another for personal injury or property damage resulting from the insured's conduct. Indeed, the Court's opinion in *Union Gas* is silent on the nature of CERCLA remedies.

Consider the particulars of the *Union Gas* decision. The question decided by the Court was whether Congress intended to abrogate the sovereign immunity of the states under CERCLA, thus subjecting the states to CERCLA cost-recovery actions in federal court. The *Union Gas* decision in no way addressed the availability of insurance coverage for CERCLA claims or the nature of environmental response costs as a form of monetary relief. As such, the *Union Gas* decision affords no basis

for review by this Court of the Eighth Circuit's decision. Nor does it call into question the distinction made in *NEPACCO* between response costs and compensatory damages for personal injuries or property damage. 842 F.2d at 987.

Indeed, other decisions of the Court affirm the Eighth Circuit's characterization of response costs as equitable. In *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988), an equitable action for an injunction and reimbursement under Medicaid, the Court recognized the essentially compensatory nature of "damages." The Court explained:

> Our cases have long recognized the distinction between an action at law for damages – which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation – and an equitable action for specific relief – which may include an order providing for the reinstatement of an employee with back pay, or for "the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions." . . . . *The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as "money damages."*

Bowen, 487 U.S. at 893 (citation omitted) (emphasis in original and added).

And, in *Exxon Corporation v. Hunt*, 475 U.S. 355 (1986), the Court specifically commented on the nature of CERCLA response costs. In *Hunt*, the Court analyzed in detail the nature of CERCLA remedies to determine the extent to which CERCLA preempts the New Jersey Spill Act, which also provides pollution remedies. In so doing, the Court explained that CERCLA response costs

are not imposed "to compensate private parties for economic harms that result from discharges of hazardous substances," but rather "to facilitate government cleanup of hazardous waste discharges and prevention of future releases." *Hunt*, 475 U.S. at 359-360.

The decisions of other federal courts are in accord. In *United States v. Northeastern Pharmaceutical & Chemical Company, Inc.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), the Eighth Circuit noted that the purpose of a government cost-recovery action pursuant to CERCLA is to replenish the Superfund where funds have been expended to remediate environmental harm. *See also Armco*, 822 F.2d at 1352 (the "form of relief requested . . . pursuant to CERCLA §107(a) is not 'damages' in the legal sense, but rather is a form of equitable, remedial relief"); and *United States v. Price*, 688 F.2d 204, 212-213 (3d Cir. 1982) (injunction directing defendants to fund diagnostic site study is equitable).

The conclusion that response costs are not "money damages" accords with statutory scheme of CERCLA. *NEPACCO*, 842 F.2d at 986. CERCLA establishes that environmental response costs are fundamentally different from traditional tort "damages" insured by liability policies. CERCLA response costs are not compensatory but regulatory and preventive. *Hunt*, 475 U.S. at 359-360.

An examination of the statutory scheme demonstrates that CERCLA distinguishes between equitable remedies and compensatory damages. Pursuant to Section 106 of CERCLA, the government may obtain a mandatory injunction or issue an administrative order compelling remediation of a hazardous waste site. Pursuant to Section 107(a)(4)(A), the government may seek restitution of its response costs from a responsible party. Section

107(a)(4)(B) permits a private party likewise to make a restitutionary claim for its response costs. On the other hand, Section 107(a)(4)(C) permits the federal government to make a claim for damages for the injury, destruction, or loss of natural resources. In this case, no claim for damages pursuant to Section 107(a)(4)(C) is at issue.

The point of these authorities is to demonstrate the nature of response costs and to go beyond the hoary labels of "equitable" and "legal" relief. "Damages" are unquestionably compensatory in nature. "Damages" are paid to a plaintiff as redress for a specific loss to person or property. On the other hand, environmental response costs are not compensatory. They are not paid to another for a specific loss to person or property resulting from the insured's conduct. Rather, they are the insured's own costs incurred in response to an exercise of the government's police power to remediate and remove pollutants and to prevent the spread or recurrence of pollution. In other words, environmental response costs are not sums which the insured shall be legally obligated to pay as "damages" because of bodily injury or property damage caused by an occurrence. Thus, they are not sums covered by liability insurance.

Quite clearly, the Eighth Circuit's decisions in this case and *NEPACCO* coincide with the Court's characterization of environmental response costs. In *Hunt*, the Court made plain that such sums are not compensatory in nature. In *Union Gas*, the Court did not hold otherwise. Accordingly, there is no conflict as to a question of federal law to afford a basis for this Court's discretionary review.

III.

THE EIGHTH CIRCUIT'S DECISION WAS PROPER UNDER MISSOURI LAW.

In any event and regardless of labels, the Eighth Circuit's decision was entirely proper under Missouri law. In determining the existence of coverage under liability insurance, Missouri courts disregard the label affixed to an underlying claim and instead examine the substance of the allegations pleaded against the insured. *Moore v. Commercial Union Insurance Company*, 754 S.W.2d 16, 18 (Mo.App. 1988). The mere mention of the term "damages" is insufficient to trigger coverage. Before and after *NEPACCO*, Missouri appellate decisions confirm that "damages" in the insurance context means a sum paid in compensation to another for personal injury or property damage sustained by another because of the insured's conduct.

In *Schnuck Markets, Inc. v. Transamerica Insurance Company*, 652 S.W.2d 206 (Mo.App. 1983), the Missouri Court of Appeals construed the "damages" term in response to the insured's argument that the term afforded coverage for punitive damages. The Missouri Court of Appeals rejected the insured's argument. The court was careful to construe the term "damages" in relation to the entire insuring agreement.

> By narrowing its inquiry to the latter quoted phrase, Schnucks eliminates qualifying language which we consider critical. The policy does not simply provide coverage for "all sums which the insured may become legally obligated to pay" but, rather, provides coverage for "all sums which the insured may become legally obligated to pay *as damages because of bodily injury . . .*" *[or] "personal injury."*

Schnuck Markets, Inc., 652 S.W.2d at 208 (emphasis in original). In holding that punitive damages were not covered, the Missouri Court of Appeals specifically explained that such damages are not in the same category as damages "for bodily injury" or "for personal injury" because "[p]unitive damages are never awarded as compensation." *Id.* at 209. And, more recently in *Heartland Stores, Inc. v. Royal Insurance Company*, 815 S.W.2d 39, 42-43 (Mo.App. 1991), the Missouri Court of Appeals reaffirmed that the term "damages" does not afford coverage for punitive damages because such damages are never awarded as a form of compensation.

In conclusion, review by this Court is unnecessary to determine whether environmental response costs are equitable or legal in nature. Regardless of these labels, the Court has already addressed the substance of such sums in *Hunt*. There, the Court made plain that response costs are not compensatory in nature. *Hunt*, 475 U.S. at 359-360. And, insomuch as such sums are not compensatory, they are not covered by liability insurance under Missouri law. *Schnuck Markets, Inc.*, 652 S.W.2d at 209; *Heartland Stores, Inc.*, 815 S.W.2d at 42-43. Therefore, the Eighth Circuit did not err in so holding, and review by this Court is unnecessary in any event.

IV.

PUBLIC POLICY DOES NOT REQUIRE THE EIGHTH CIRCUIT'S DECISION TO BE REVERSED.

Petitioner suggests that review of the Eighth Circuit's decision and an express determination by this Court that CERCLA response costs are "money damages" would reduce litigation over insurance coverage, discourage forum shopping, and encourage the use of limited financial resources to pay for actually cleaning up hazardous

waste sites. Petitioner's suggestion is nothing less than an invitation to this Court to disregard policy language and state-law contract standards to create a "deep pocket" to underwrite the cost of remediating past environmental harm. This pocket, however, is not that deep. The surplus for all U.S. property/casualty insurers totals about $130 billion, less than one-fourth of the estimated cost of the Superfund program. *Insurer Liability for Cleanup Costs of Hazardous Waste Sites: Hearing Before the Subcommittee on Policy Research and Insurance of the House Committee on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. (1990) ("Potential Liability of Property/Casualty Insurers for Costs of Cleaning Up Hazardous Waste Sites" (U.S. General Accounting Office)).

To the contrary, rendering insurers liable for the cost of environmental cleanup would be against public policy. Congress "impos[ed] liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole." *United States v. NEPACCO*, 810 F.2d at 734. It did not impose that duty upon liability insurers. One commentator has so noted:

> [I]t is contrary to public policy to allow a responsible party to pass on the costs of cleanup, as well as other costs recoverable under Superfund, to its insurance carriers, and thereby retain the benefit of having another perform its public duty without ever having paid for it.

Brett, *Insuring Against the Innovative Liabilities and Remedies Created by Superfund*, 6 UCLA J. Envtl. L. & Pol'y 1, 52 (1988).

In the guise of public policy, petitioner seeks to shift the cost of environmental remediation to the insurance industry, notwithstanding the fact that liability insurance was never meant to indemnify such risks and insureds never paid premiums for such coverage. Petitioner's contention should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JEFFREY L. CRAMER
T. MICHAEL WARD *
BROWN & JAMES, P.C.
705 Olive Street, Suite 1100
St. Louis, Missouri 63101
(314) 421-3400
Counsel for Respondent.

*Counsel of Record

September 3, 1992